MOTION FILED
SEP 2 1976

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1707

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,

Appellants

vs.

LEONARD PAUL HODORY,

Appellee

On Appeal from the United States District Court for the Northern District of Ohio, Eastern Division

MOTION FOR LEAVE TO INTERVENE AND BRIEF IN SUPPORT OF THE MOTION

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MOTION TO INTERVENE

NOW COMES Republic Steel Corporation by its attorney, Walter J. Mackey, and moves this Court for leave to intervene in the above-captioned action for the purpose of participating in the appeal of the above action on the ground that it has an interest in appellee's right to unemployment benefits which it otherwise may not be able to protect.

Respectfully submitted,

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Appellee

BRIEF IN SUPPORT OF MOTION TO INTERVENE

We submit that Republic Steel Corporation is entitled to intervene in this action for the following reasons:

1. REPUBLIC STEEL CORPORATION HAS A SUBSTANTIAL AND DIRECT ECONOMIC INTEREST IN THIS ACTION.

The system of "experience rating" under the Ohio Unemployment Compensation law has been described in some detail in the Jurisdictional Statement of the Attorney General on behalf of the Ohio Bureau of Employment Services and in other pleadings in this case.

The plan of charging an employer's account with benefits paid to his employees and crediting his account with contributions to arrive at his contribution (tax) rate has been explained.

Briefly stated, an employer's payments into the State Trust Fund are measured and controlled by the amount of unemployment benefits paid to his employees. Although referred to as "contributions" in the law, the courts have generally characterized these payments as payroll excise taxes.

Although the exact amount of charges to Republic Steel's accounts resulting from the lower court's decision is not shown in the record of this case, the economic impact resulting from increased taxes on its payroll would be substantial. (See Affidavit of Jack R. Vanek — Appendix A)

2. REPUBLIC STEEL CORPORATION HAS BEEN DENIED DUE PROCESS IN THE COURT BELOW.

Republic Steel is an interested party in the cases that are pending with the Board of Review of the Ohio Bureau of Employment Services.

The decision of the Three Judge District Court interrupted the orderly processing of these appeals in the state courts and by failing to make Republic a party denied it an opportunity to appear and present evidence, a denial of procedural due process.

The Appellee invoked the jurisdiction of the federal court below to accomplish the same purpose as in the state administration and judicial process, to wit — the right to unemployment benefits. Republic Steel has the same economic and legal interest in this court in opposing these claims for unemployment benefits.

3. A MOTION TO INTERVENE IN THE FEDERAL DISTRICT COURT WAS DENIED.

On March 5, 1976, the Three Judge District Court issued a Memorandum Opinion enjoining the Ohio Bureau of Employment Services from denying unemployment benefits to a large number of employees of Republic Steel who had been denied benefits on the ground that their unemployment was due to a labor dispute as provided in Sec. 4141.29(D)(1)(a).

Republic Steel Corporation was not notified of this action in the lower court and did not receive a copy of the decision by the court until sometime late in March, 1976.

A Motion for Leave to Intervene was filed in the District Court under Rule 24(a)(2) of the Rules of Civil Procedure which leave was denied.

In denying a similar motion to intervene by United States Steel Corporation the lower court stated,

> "The present defendants (Ohio Bureau of Employment Services) have a considerable interest in the outcome of the appeal and their interests are essentially the same as that of the United States Steel."

(Parenthetical material supplied) (See Appendix B)

As discussed below we believe the District Court was in error in equating the interests of the steel companies with that of the state agency administering the law.

4. REPUBLIC STEEL CORPORATION'S INTERESTS IN THIS CASE CANNOT BE ADEQUATELY REPRESENTED BY THE STATE AGENCY WHICH ADMINISTERS THE LAW.

In the first place the Bureau of Employment Services has no financial interest in the outcome of this action.

On the other hand, it is clear that the charges to Republic's account resulting from the allowance of these claims for unemployment benefits will have an adverse effect on its experience rating causing an increase in its payroll taxes for unemployment compensation.

While the administrator has the duty of protecting the Trust Fund from unwarranted payment of benefits, his primary responsibility is the impartial administration of the law without taking the side of either the employer or the claimant in controversial cases.

The principle that a governmental agency cannot represent the interest of a private party has been expressed in the case of *Trbovich vs. United Mine Workers*, 404 U.S. 528, 538-9 (1972). The reasoning is sound and recognizes the fact that in a case such as this the governmental agency has the dual function of representing the public interest in enforcing the law and also championing the cause of the private party which may not dictate precisely the same approach in the conduct of litigation. Only by coincidence is the Bureau on the same side as Republic Steel in this action.

5. THE PRINCIPLES ADOPTED IN RULE 24(a)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE SHOULD BE INVOKED IN ALLOWING THIS MOTION TO INTERVENE.

We realize that these Rules of Civil Procedure apply directly to procedure in the lower federal courts. However, the situation of Republic Steel Corporation in this case falls squarely within the scope of Rule 24(a)(2) which permits intervention:

> "(2) Where the applicant claims an interest re-

> lating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

We have demonstrated that Republic Steel Corporation has a direct financial interest in the property which is the subject of this action; that the disposition of this action without Republic's participation would destroy its ability to protect such interest; that the Ohio Bureau of Employment Services does not and cannot be expected to adequately represent the interest of Republic Steel in this case; and that Republic's Motion to Intervene in the lower court was denied.

For the above reasons we submit that this Court should exercise its discretion and allow Republic Steel Corporation's Motion to Intervene for the purpose of participating in the appeal of this action to the United States Supreme Court.

Respectfully submitted,

WALTER J. MACKEY
1480 West Lane Avenue
Columbus, Ohio 43221
614-486-1655
Attorney for
Republic Steel Corporation

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 75-15 Y

LEONARD PAUL HODORY,
Plaintiff

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendants

STATE OF OHIO)
) SS.
COUNTY OF CUYAHOGA)

AFFIDAVIT

BEFORE ME, a Notary Public, in and for said County personally appeared Jack R. Vanek, who being duly sworn, deposes and says:

1. I am Jack R. Vanek, Manager, Payroll and Employee Benefits Accounting, Republic Steel Corporation.

2. I have responsibility for the overall handling of unemployment compensation matters within Republic Steel Corporation.

3. In 1974, a large number of Republic Steel Corporation employees lost their employment with Republic at its Warren, Youngstown and Cleveland plants as a result of a coal shortage caused by a strike by the United Mine Workers of America at the Corporation's coal mines.

4. Many of the employees who became so unemployed applied for unemployment benefits under the Ohio Unemployment Compensation Law.

5. The Ohio Bureau of Employment Services denied most of the claims for unemployment benefits by the employees at the Warren plant because of the labor dispute disqualification provisions in the Ohio Unemployment Compensation Law but allowed benefits to most of the employees at the Cleveland and Youngstown plants.

6. Republic Steel Corporation was not made a party to the above action and had no knowledge of its existence until newspaper accounts concerning this court's decision appeared in the local papers.

7. Republic Steel Corporation did not receive a copy of the decision in this action until sometime in early March, 1976.

8. Under the Ohio Unemployment Compensation Law an employer's unemployment tax rate is controlled by the amount of benefits paid to his employees.

9. The merit rating provisions of the law are designed so that an employer pays into the trust fund approximately the amount paid out to his employees in the form of unemployment benefits. Republic Steel Corporation, therefore, has a very definite and direct financial interest in this action as it applies to pending claims before the state administrative agency and to future claims which invoke the labor dispute disqualification provisions of the Ohio Unemployment Compensation Law.

JACK R. VANEK

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 75-15Y

LEONARD PAUL HODORY,
Plaintiff

OHIO BUREAU OF EMPLOYMENT SERVICES, et al.,
Defendant

CELEBREZZE, Circuit Judge
LAMBROS, District Judge
KRUPANSKY, District Judge

ORDER

Republic Steel Corporation has moved this Court, pursuant to Rule 24(a)(2), Federal Rule of Civil Procedure to intervene as a defendant in the appeal of the above styled case. Republic Steel contends that intervention of right must be allowed due to the financial interest it has in the disposition of this action.

On April 21, 1976 United States Steel filed a motion to intervene with this Court similar to that of Republic Steel. United States Steel also asserted that intervention of right must be allowed due to the financial consequences to it resulting from judgment entered in this case on March 5, 1976.

By its order of May 26, 1976 the Court dismissed the above motion of United States Steel for lack of jurisdiction. The Court further found that in the event

it should be deemed to have jurisdiction to entertain the motion of United States Steel, that such motion must be denied on the merits as it was not filed in a timely fashion.

The Court finds its prior order of May 26, 1976 and the findings set forth therein regarding the jurisdiction of this Court and the merits of the motion of United States Steel, to be dispositive of the motion to intervene of Republic Steel. Accordingly, the motion to intervene of Republic Steel is denied.

IT IS SO ORDERED.

ANTHONY J. CELEBREZZE
Circuit Judge
THOMAS D. LAMBROS
United States District Judge
ROBERT B. KRUPANSKY
United States District Judge

DATED: 6-4-76